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BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

DEC 20 1989

Federal Communications Commission
Office of the Secretary

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In the Matter of)

REQUEST BY A. C. NIELSEN COMPANY)
FOR THE COMMISSION'S AUTHORIZATION)
FOR TELEVISION BROADCAST STATIONS)
TO TRANSMIT ENCODED INFORMATION)
ON LINE 22 OF THE ACTIVE PORTION)
OF THE TELEVISION VIDEO SIGNAL.)

DA 89-1060

To: The Commission

MOTION FOR STAY

Airtrax, by its undersigned attorney, hereby respectfully moves the Commission to stay the effectiveness of action taken by the Chief of the Mass Media Bureau (the "Chief") on November 22, 1989, pending the Commission's action upon Airtrax's Application for Review of the Chief's action (the "Application"), which is being filed with the Commission concurrently herewith under separate cover. In support, Airtrax submits the following:

1. Over the vigorous objection of Airtrax, the Chief, by letter to counsel for A. C. Nielsen Company ("Nielsen") dated November 22, 1989, granted Nielsen an authorization that will permit participating television stations to transmit Nielsen's program identification codes on Line 22 of the active portion of the video signal transmitted by those stations.

2. The Chief recognized the possibility that the placement of Nielsen's codes on Line 22 of program videotapes could have the effect of overwriting Airtrax's codes placed on Line 22 of commercial advertisements that are typically integrated into the videotape prior to the placement of the Nielsen codes on the tape.

3. The Chief elected not to resolve the dispute in the record between Airtrax and Nielsen over whether such overwriting of Airtrax codes by Nielsen codes would be likely to occur. Rather, the Chief imposed certain conditions upon Nielsen's authorization for the placement of codes on Line 22 that he felt would protect Airtrax from such overwriting.

4. Those conditions are that (1) Nielsen's authorization will expire on May 1, 1990, (2) Nielsen's codes must be confined to those portions of the program videotape that Nielsen seeks to track, and (3) the codes of Airtrax or other authorized users of Line 22 must not be adversely affected.

5. The conditions imposed by the Chief, though well intentioned, will not be sufficient to protect Airtrax. Airtrax is a fledgling company that is still in the process of educating and attracting clients to the Airtrax system of identifying and verifying the broadcast by television stations

of Airtrax-encoded commercial advertisements. In its efforts to market a new and largely unfamiliar service to national television advertisers and their agencies, Airtrax must necessarily depend heavily upon the reliability of its system to function as designed and marketed. In the absence of contamination, Airtrax's system has performed to date with an extraordinarily high level of reliability in identifying Airtrax-encoded commercial advertisements and in verifying the presence of certain features in those advertisements as they were aired by Airtrax-monitored television stations (e.g., color content, stereo audio, etc.).

6. On the other hand, if Airtrax's system were to suffer contamination as the result of whole or partial overwriting of Airtrax codes by Nielsen codes, Airtrax's reputation and that of its system would suffer. Given Airtrax's position as a "start-up" entrepreneur attempting to persuade advertisers and their agencies to place their confidence in a new technology, the significance of even a limited number of instances of the overwriting of Airtrax codes by Nielsen codes would be entirely out of proportion to the actual number of such instances. Should such overwriting occur, even sporadically, the reputation of Airtrax's system would be fixed in the marketplace, and no amount of explanation concerning violations of the conditions imposed by the Chief upon Nielsen's authorization to use Line 22 would alter the

perception that the Airtrax system had failed to perform with the promised level of reliability. While Airtrax might have recourse under those circumstances to request the Chief to suspend Nielsen's authorization to use Line 22, that relief would be academic. Once the advertisers and their agencies would have determined that the Airtrax system had not performed as designed and marketed, Airtrax would be finished as a viable business entity, and there would be no point in seeking to enforce thereafter the conditions imposed in the Chief's authorization to Nielsen.

7. Likewise, were the Commission to grant Airtrax's Application, such relief would come too late to save Airtrax from the consequences of the overwriting of Airtrax codes by Nielsen codes in the interim. Accordingly, Airtrax moves the Commission to stay the effectiveness of the Chief's action, pending Commission action upon Airtrax's Application.

8. The criteria for obtaining a stay of agency action are the following:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the

issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

9. If the final three criteria quoted above strongly favor the grant of a stay, a stay may be issued in the discretion of the staying authority if the petitioner, under the first criterion, has made a "substantial case on the merits" of its appeal. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

10. Airtrax's Showing on the Merits. Paragraphs 5-7, *supra*, and 14-17, *infra*, clearly demonstrate that the conditions imposed by the Chief upon Nielsen's authorization to use Line 22 will fail to achieve their intended objective, *i.e.*, protecting Airtrax's codes from being overwritten. Airtrax's Application is therefore likely to prevail upon the merits, inasmuch as the Chief's action is inconsistent with his stated intent. Alternatively, assuming that Airtrax's showing under the remaining three criteria set forth in *Virginia Petroleum Jobbers, supra*, is deemed to be strong, Airtrax need only make a substantial case on the merits of its Application, *Washington Metropolitan Area Transit Commission, supra*, which Airtrax has manifestly done.

11. Irreparable Injury to Airtrax. Paragraphs 5, 6, and 7, *supra*, demonstrate that Airtrax will be put out of business if Nielsen's Line 22 authorization is implemented in a manner that results in even a limited number of instances of the overwriting of Airtrax codes by Nielsen codes. Although Nielsen's current authorization would be jeopardized thereby, following the elimination of Airtrax as a viable user of Line 22 Nielsen can return to the Commission in the future when there would be no Airtrax left to protect, and therefore no need for conditions to be imposed upon Nielsen's next authorization to use Line 22. Absent a stay, Airtrax will be extinguished under the Chief's authorization. Consequently, Airtrax has demonstrated that it will be irreparably injured in the absence of a stay.

12. No Substantial Harm to Nielsen. No actual harm would accrue to Nielsen in the event of a stay of the Chief's conditional authorization, since Nielsen cannot in fact implement the authorization without violating its conditions and thereby causing the authorization to be withdrawn.

13. In his letter to Nielsen's counsel, the Chief warned that "this temporary authorization may be withdrawn summarily at the Commission's discretion if the Commission has reason to believe that other systems are being adversely affected." Letter from Roy J. Stewart to Heron, Burchette, Ruckert & Rothwell, dated November 22, 1989, at p. 5.

14. Nielsen has not directly disputed Airtrax's assertion that it is unrealistic to expect an operator of equipment placing Nielsen codes on Line 22 of a program videotape to be able to shut off the encoder precisely at the point in the videotape when an Airtrax-encoded segment is encountered, without overwriting at least the first several frames containing the Airtrax codes (and potentially much more). However, Nielsen has suggested that technology is available that would enable encoding equipment to be modified in order to incorporate a function that would automatically suspend the placement of Nielsen codes on Line 22 whenever other codes are detected. See Nielsen's Reply Comments filed in DA 89-1060 on October 2, 1989, at Para. 29, pp. 23-24, and Exhibit B.

15. Nielsen's suggestion that technology exists to incorporate an automatic "pause" feature in encoding equipment was based upon a letter to Nielsen from Ronald G. Schlameuss, the President of Valley Stream Group, Ltd., which manufactures such equipment.

16. However, as was established in a subsequent exchange of correspondence between Mr. Schlameuss and Ken Patterson of Absolute Post, Inc. (copies of which are submitted in Appendix A hereto), it appears that Mr. Schlameuss's statement to Nielsen was based upon a fundamental

misapprehension on his part that the Nielsen codes would continue to be placed on Line 20 of the vertical blanking interval. In fact, Mr. Schlameuss informed Mr. Patterson that the so-called "SID" encoders, as modified, could be expected to detect the existence of codes on Line 22 only "with some regularity." Letter of November 17, 1989 from Mr. Schlameuss to Mr. Patterson. And, even that was projected by Mr. Schlameuss as no better than a "*possibility*" (emphasis in original.) *Id.*

17. If it is merely a "possibility" that Nielsen could implement its conditional authorization to use Line 22 in a manner that would protect Airtrax's codes on Line 22 only "with some regularity," it is unlikely that Nielsen can expect to implement and to retain its authorization for very long. For, as the Chief's letter to Nielsen's counsel warned, violations of the condition requiring protection of Airtrax's codes on Line 22 will lead to summary withdrawal of the authorization. Accordingly, since Nielsen cannot take advantage of its conditional authorization without risking its withdrawal, Nielsen will not be substantially harmed by a stay of the effectiveness of the authorization, pending the Commission's action on Airtrax's Application.

18. **The Public Interest.** The public interest clearly supports protecting Airtrax's service from having


Nielsen codes overwrite Airtrax's codes on Line 22 during the pendency of the Commission's consideration of Airtrax's Application. Implicit in the conditions imposed by the Chief is the assumption that the public interest will be served by protecting Airtrax's expectation that its contractual commitments to perform its services on behalf of its clients will not be interfered with as the result of Nielsen codes overwriting Airtrax codes on Line 22. Given a choice between compelling Nielsen to continue to place its program identification codes on Line 20, as Nielsen has done for years, or allowing Nielsen to implement its conditional authorization with the result that the authorization will be withdrawn and Airtrax will be extinguished, the public interest clearly favors the former course.

WHEREFORE, having satisfied the criteria of *Virginia Petroleum Jobbers* and *Washington Metropolitan Area Transit Commission, supra*, Airtrax respectfully prays the Commission to stay the effectiveness of the action taken by the Chief, pending the Commission's action upon Airtrax's Application.

Respectfully submitted,

AIRTRAX

By:


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December 20, 1989

0825J

Airtrax

DA 89-1060

**Motion for Stay
December 20, 1989**

APPENDIX A

Mr. Ronald G. Schlameuss,
President
Valley Stream Group, Ltd.
28 Fourth Street
Valley Stream, NY 11581



Mr. Schlameuss,

To recap our conversation of Monday, October 16, 1989:

1. I introduced myself as Ken Patterson, Chief Engineer at Absolute Post, Inc. the Burbank, California encode site for AirTrax, Inc.
2. We discussed the problem of using your encoding equipment to add Nielsen AMOL to a tape that contains segments with AirTrax encoding, LEAVING THOSE AIRTRAX ENCODED SEGMENTS COMPLETELY INTACT.
3. You said it should be no problem, as AMOL was on line 20 and AIRTRAX on line 22. I then informed you that AMOL was attempting to secure FCC approval to use line 22 as well.
4. You stated you felt your existing equipment could be modified to recognize AirTrax code by being able to read luminance at a repeatable, clockable level, but that your SID Encoder would not actually decode the AirTrax information, or recognize it as anything other than changing luminance levels. The SID Encoder would only allow the AMOL encoding to take place at points in the tape when the "changing luminance" levels WERE NOT detected on line 22 ("active video").

Again let me thank you for taking the time to speak with me regarding the AMOL/AirTrax encoding questions.

A handwritten signature in dark ink, appearing to read "Ken Patterson".

K. Patterson
Chief Engineer

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2911 WEST OLIVE AVE.
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28 FOURTH STREET
VALLEY STREAM, NY 11581
516-568-9449

Nov. 17 1989

Mr. Ken Patterson
Absolute Post, Inc.
2911 West Olive Ave
Burbank CA 91505

Mr. Patterson,

Other than our telephone conversation of Oct. 16, 1989, I am not aware of any phone calls made by you to our office.

I have received your FAX of Oct. 20, 1989 [copy attached], and it is essentially correct, with some clarifications to item four.

I believe that I stated that there was a *possibility* that the SGR-38 could be modified, via firmware, to enable the detection of a signal other than SID [on line 22] with some regularity [ie. repeatable bit rate and temporal position and constant luminance level], without actually decoding the signal, and to allow the signal to pass unencumbered.

I am curious to your as to your formality regarding this speculative discussion.

Yours truly,



Ronald G. Schlameuss
president

CERTIFICATE OF SERVICE

I, Lois L. Trader, a secretary in the law firm of Bryan, Cave, McPheeters & McRoberts, do hereby certify that I have on this twentieth day of December, 1989, caused copies of the foregoing MOTION FOR STAY to be sent by first-class United States mail, postage prepaid, to the following:

*The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, Northwest
Room 814
Washington, D. C. 20554

*The Honorable James H. Quello
Member
Federal Communications Commission
1919 M Street, Northwest
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Washington, D. C. 20554

*The Honorable Sherrie P. Marshall
Member
Federal Communications Commission
1919 M Street, Northwest
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*The Honorable Andrew C. Barrett
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*Roy J. Stewart, Esquire
Chief
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Counsel to A. C. Nielsen Company


Lois L. Trader

*/ Delivered by hand.